84-1199

No. 84-.....

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAYNE KING MOORE, Petitioner

v.

STATE OF ALABAMA, Respondent

Petition for a Writ of Certiorari
To The Alabama Court of Criminal Appeals

JAYNE KING MOORE, pro se
Attorney for herself

P.O. BOX 5071
Montgomery, Alabama 36103
205 / 262-7381 (days)

QUESTIONS PRESENTED FOR REVIEW

I.

PRESENTENCE REPORT / DUE PROCESS

Did the failure of the Trial Court to allow correction of the false and defective Pre-sentence Report prejudice the Defendant, so as to deprive her of constitutional due process?

Can the sentence procedure satisfy the Due Process Clause,

(1) "if a sentence is based on misinformation", and

(2) the Defendant was deprived of "adequate time" to rebut, because

(3) the Defendant was shown "a copy of the pre-sentence report on the morning of the sentencing", and

(4) the "Sentencing court failed to respond to defendant's allegation that (the) pre-sentence report contained inaccurate information", and

(5) the Court "erred in at least failing to acknowledge the allegations of the defendant" in her MOTION TO VACATE SENTENCE, duly challenging at least 9

specific false and prejudicial statements, and

(6) the Court failed and refused to "exercise discretion" to correct the report or vacate the sentence "when called upon to do so", and when

(7) the Court "failed to insure fairness and accuracy"[1] ?

II.
FAILURE TO PROPERLY CHARGE THE JURY

The Court erred in refusing to give Defendant's requested instructions on the defense of "duress of coverture", based on the innocent wife to guilty husband relationship, thus depriving Defendant of an impartial jury trial, due process and equal protection, guaranteed by the Sixth and Fourteenth Amendments.

Was the Defendant deprived of her rights, when,

(1) The Trial Judge agreed in writing to charge that "mere presence" where drugs were found does not constitute criminal conduct, nor "constructive possession", but later

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[1] Quotes to later authority.

failed to charge the "same rule of law" "substantially and fairly" to the jury, and when

(2) The Trial Judge, well knowing Defendant's husband had been previously convicted for narcotics possession on the same evidence shown by the State, refused to instruct on "duress of coverture", and the husband-wife relationship, which were indispensible to the defense, and when

(3) The Alabama Court of Criminal Appeals held that Defendant's requested and refused charges were not "preserved for our review pursuant to **ALLEN v STATE** 414 So.2d 989 (Ala.Cr.App. 1981), affd., 414 So.2d 993 (Ala. 1982)"?

III.
JUDGMENT OF ACQUITTAL
NO PRIMA FACIE CASE

Was the Motion to Acquit for failure of the State make a prima facie case on illegal possession of drugs, based on circumstantial evidence, due to be granted, when

(1) There was no evidence but Defendant's proximity and non-exclusive residency at the premises where the drugs were found, and

(2) The State's case in chief allowed the conclusion to be drawn that it was the Defendant's husband, and not she, who was in "possession" of the illegal drugs seized, and the Court was obligated to apply the rule of law that if the State's case rests on circumstantial evidence it is necessary that the evidence shown exclude all rational conclusions except that of the defendant's guilt, and when

(3) There was no "substantial evidence" to provide an affirmative link beyond mere "constructive possession" to allow a legitimate inference of "guilty knowledge" and when

(4) A reasonable juryman could have good cause to doubt that Defendant was a possessor of the drugs, apart from her husband?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES CITED.....vi

REPORTED OPINION BELOW..... 1

JURISDICTIONAL STATEMENT..... 1

PROVISIONS OF LAW..... 2

STATEMENT OF THE CASE:

A. Proceedings..... 3

B. Facts..... 8

REASONS FOR GRANTING THE WRIT:

I. PRESENTENCE REPORT..... 10

II. JURY INSTRUCTIONS..... 16

III. ACQUITTAL DENIED..... 30

CONCLUSION..... 46

AFFIDAVIT OF SERVICE..... 48

APPENDIX A:

TRIAL COURT ORDER..... 49

TABLE OF AUTHORITIES CITED

UNITED STATES CONSTITUTION

Sixth Amendment.....15
Fourteenth Amendment.....10,15,23

CASE AUTHORITIES

ALLEN v STATE 414 So2d 989 (Al.App.1981)
aff. 414 So2d 993 (Ala. 1982).....19-23

ARRELLANES v U.S. 302 F?? 603 (CA- 1962).....28

BRAXTON v STATE 82 So 657 (Ala.).....26

COOK v STATE 341 So2d 183.....36

EVANS v U.S. (CA9 1958).....34

GARDNER v FLORIDA 430 U.S. 349 (1977).....10

GARSED v STATE 51 Ala.App. 622
288 So2d 161 (1973).....36

LANDERS v STATE 152 SE2d 431 (Ga. 1966)....28,32

PARKS v STATE 46 Ala.App 722
248 So2d 762 (Ala.Cr.App. 1971)....33,34

PEOPLE v VILLANUEVA 220 Cal.App 443
33 Cal Rptr 811.....44

PEOPLE v MAJOR Mich.App. 307 N.W. 2d 451.....11

RADKE v STATE 42 Ala.App. 397, 293 So2d 312
Affd. 292 Ala. 290, 293 So2d 314.....38

STATE v BAXTER 208 SE2d 696 (N.C. 1974).....27

STATE v McGEE 473 SW2d 686 (Mo. 1971).....32

STROUSE v LEIPF 14 So 667 (Ala. 1894).....26,27

TOWNSEND v BURKE 334 U.S. 736 (1948).....11

U.S. v DiNOVO 523 F2d 197 (CA_ 1975).....29

U.S. v ESPINOZA 481 F2d 553 (CA5 1973).....11

U.S. v ROBIN 545 F2d 775.....11

U.S. v ROSNER 485 F2d 1213 (CA2 1973).....11

U.S. v VALENZUELA 596 F2d 824 (CA_ ____).....29

U.S. v WESTON 448 F2d 626 (CA- ____).....15

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 29(a).....31,45

1975 CODE OF ALABAMA

Section 12-16-13.....21,22
Section 20-2-70 .....
Ala. Temp. Rules Cr. Proc. 13(d).....

OTHER AUTHORITY

56 ALR3d 948.....

COOLEY ON TORTS Section 115.....27

GEORGETOWN LAW JOURNAL Vol.66,1515.....12,13

HARVARD LAW REVIEW Vol.93 No.2.....10

LAND AND WATER REVIEW Vol.IX at 247....

VIRGINIA LAW REVIEW Vol.58 No.5, 776
"CONSTRUCTIVE POSSESSION IN NARCOTICS CASES..31

WHARTON'S CRIMINAL EVIDENCE
"BURDEN AND DEGREE OF PROOF"
Section 17, "Corpus Delecti".....36

In The
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October Term, 1984

NO. 84-.....

JAYNE KING MOORE, Petitioner

v.

STATE OF ALABAMA, Respondent

Petition for a Writ of Certiorari
To The Alabama Court of Criminal Appeals

Petitioner requests that a writ of certiorari issue to review the judgment of the Alabama Court of Criminal Appeals in this case, and the judgment of the Alabama Supreme Court in denying certiorari.

REPORTED OPINION BELOW

1. The Alabama Court of Criminal Appeals issued an OPINION on July 17, 1984, affirming the Judgment and Sentence of the Montgomery County, Alabama, Circuit Court, where the Defendant Jayne Moore had been convicted of illegal possession of "controlled substances", in violation of 1975 CODE OF ALABAMA, section 20-2-1 et seq. Rehearing and certiorari were denied in the Alabama system.

The OPINION of the Court of Appeals was duly reported, **Jayne King MOORE, alias v. STATE, 457 So.2d 981.**

JURISDICTIONAL STATEMENT

1. Certiorari was denied by the Alabama Supreme Court Oct. 19, 1984, with Petition for Certiorari due in this Court on or before Dec. 18, 1984. Petitioner applied for, and was granted an extension of time, until Jan. 17, 1985.

2. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1), and Article III,

Section 2, of the Constitution of the United States, involving federal and constitutional questions, decided in conflict with this Court, the Alabama Supreme Court and other State Courts of last resort.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment Five pertinently states:

> "No person shall ... be deprived of life, liberty or property, without due process of law ..."

Amendment Six pertinently states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

Amendment Fourteen pertinently states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

1975 CODE OF ALABAMA

Section 12-16-13 pertinently states:

> "Charges moved for by either party must

be in writing and must be given or refused in the terms in which they are written, and it is the duty of the judge to write "given" or "refused" as the case may be, on the document and sign his name thereto, which thereby becomes a part of the record. Charges which are marked "given" by the trial judge must be taken by the jury with them on retirement, and those "refused" must be retained by the clerk. ... The refusal of a charge, though a correct statement of the law, shall not be cause for a reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury ... In case of appeal, the charges must be set out in the record ... in the following manner ... (4) The charges refused to the appellant. Every general charge shall be in writing or be taken down by the court reporter as it is delivered to the jury."

Section 20-2-70 pertinently states:

"(a) Except as authorized ... any person who possesses ... controlled substances enumerated ... is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition may be fined not more than $25,000.00 ..."

STATEMENT OF THE CASE

A.
Proceedings in the Courts Below

Defendant was charged by Grand Jury Indictment with three counts of "possession" of "controlled substances"; Cocaine, Diazepam, and Marijuana, with penalties prescribed by 1975 CODE OF

ALABAMA, 20-2-70.

Jury Trial was held in Montgomery County Circuit Court September 12, 1983.

During the State's case in chief, Defendant objected to all evidentiary items for lack of any requisite connection to the accused. Defendant showed that her husband had been separately convicted of "possession" of the same drugs, by the same evidence.

At the close of the State's case, Defense Attorney, Robert Cheek, moved for a verdict of acquittal; and for a directed verdict, and to exclude the State's evidence (R:153), which motions were summarily denied by the Court. A written ORDER (R:153) issued, setting out the rationale for the Court's denial.[1]

The defense case was based on "duress of coverture" under the husband-wife relationship, and the possibility of the

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[1] Bound in APPENDIX herein.

innocent spouse, in non-exclusive occupancy of the premises; and Counsel submitted requested jury instructions Numbers 2, 3 and 4, on that basis.

Before jury deliberations began, the Court agreed to charge Defendant's Requested Instruction NO.2 in substance, but later failed to do so.

The Court refused to give Defendant's Instructions NO.3 and NO.4, the essence of Jayne's legal defense, and the jury returned with a "guilty" verdict in less than 25 minutes. (R:195,197)

A pre-sentence investigation was ordered, (R:219) and sentencing was set for September 26th, when Attorney Cheek appeared and received a copy of the Pre-sentence Report for examination in the courtroom. His response to the preparer of the Report, in full hearing of the Court was: "Where did you get this

pack of lies?" (SR:21)[2]

Judge Phelps admonished Mr. Cheek (R:217), then heard some information from Cheek about the Defendant's mental state, and summarily sentenced the Defendant to ten years in the Penitentiary (R:222).

October 26th, 1983, Defendant timely filed her MOTION TO VACATE SENTENCE (R:224), seeking a hearing, and access to the "false and fraudulent" Pre-Sentence Report (R:225). She demanded correction of the Report, and a vacation of the sentence. The MOTION was ignored. No hearing was set.

A MEMORANDUM IN SUPPORT (R:242) was also duly filed, citing nine (9) specific falsehoods in the Report, as known to the Defendant. The content was ignored by the Court.

Defendant also timely filed a MOTION FOR A NEW TRIAL (R:226) citing extensive

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[2] SUPPLEMENTARY RECORD, page 21.

error, and raising, among other issues, REFUSAL TO GIVE DEFENDANT'S CHARGES (R:228) and FAILURE TO MAKE A PRIMA FACIE CASE (R:228), questions now before this Court.

The MOTION was supported by fact and law, in MEMORANDUM (R:230), but both were ignored by the Court until January 12, 1984, long after the Court had lost statutory jurisdiction on December 27, 1983.[3]

Defendant later filed her MOTION TO SUPPLEMENT/CORRECT THE RECORD on appeal, which was granted.

The substance of all QUESTIONS PRESENTED FOR REVIEW, raised herein, were duly raised before the Alabama Court of Criminal Appelas, where relief was denied, by OPINION of July 17, 1984.[4]

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[3] **ALABAMA RULES OF CRIMINAL PROCEDURE**, Temporary Rule 13(d), Feb. 23, 1980.

[4] **MOORE v STATE**, supra.

B.

Statement of the Facts

The "statement of facts" contained in the OPINION of **MOORE**, supra, omits any recognition of the Record portions showing the reasons for the Defendant's "heading toward the mobile home"(R:42,102,137). The raiding officers had shot her dog in the head (R:94), and had left the property gates open, allowing the cows to wander onto the roadway.

The "evidence" of residence was all hearsay, duly objected to, except for the direct "evidence" offered by Officer Rhegness. His statement "I recall asking her her name and if she lived there and she told me and affirmed 'yes' she lived there" (R:99) was denounced to the Trial Court as a perjury by Mrs. Moore. She moved (R:240) to set a hearing and try the perjury of Rhegness, but the hearing and Motion were denied.

Jayne Moore made no material statements to any of the Police Officers at any time. None of the trial evidence was directly connected to her. The State's witnesses unanimously admitted they had never seen her with any of the physical items of evidence in her possession, including the drugs. There was no evidence that even the "women's clothing" found in the trailer belonged to her.

The "facts" of the OPINION must be examined more for what they do not say, than what they affirmatively show.

"Proximity" and "non-exclusive possession" were shown; nothing else.

REASONS FOR GRANTING THE WRIT

The Alabama Supreme Court, a State Court of Last Resort has denied certiorari in Petitioner's case, and has, thereby, upheld an erroneous decision of the Alabama Court of Criminal Appeals. It was a decision on federal questions in

conflict with the United States Constitution; and in conflict with decisions of other State Courts of Last Resort and the opinions of this Court.

QUESTION
I.
PRESENTENCE REPORT / DUE PROCESS

Did the failure of the Trial Court to allow correction of the false and defective Pre-sentence Report prejudice the Defendant, so as to deprive her of constitutional due process?

Petitioner has cited seven specific sub-points as a part of the QUESTION I, and cites the following authority, on each sub-point, quoting from the full text of **HARVARD LAW REVIEW** Volume 93, Number 8, June 1980, entitled "DUE PROCESS AT SENTENCING ..." (SR:22 et seq.):[5]

> (1) "it is ... clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause ..." **GARDNER v FLORIDA** 430 U.S. 349 (1977).
>
> (2) "Defendant denied adequate time to

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[5] Record Supplement, page 22.

prepare and present a rebuttal" **UNITED STATES v ROBIN** 545 F.2d 775.

(3) "Defense Counsel requested (and was shown) a copy of the pre-sentence report on the morning of the sentencing. We held that the defendant lacked adequate opportunity to prepare a rebuttal and that defense counsel's well meant attempts to rebut at sentencing could not cure the defect." **UNITED STATES v ROSNER** 485 F.2d 1213 (CA2 1973)

(4) "Sentencing court failed to respond to defendant's allegation that (the) presentence report contained inaccurate information" **PEOPLE v MAJOR** Mich.App. 307 N.W.2d 451, 453.

(5) "Trial judge erred in at least failing to acknowledge the allegations of the defendant." **PEOPLE v MAJOR**, supra.

(6) "The failure to exercise discretion when called upon to do so is error" **UNITED STATES v ESPINOZ** 481 F.2d 553 (CA5, 1973)

(7) "Court failed to insure fairness and accuracy ... must be held to be plain error and an abuse of discretion" **UNITED STATES v ROBIN**, supra.
779.

The Trial Court was shown:

"in certain circumstances due process is violated if a sentence is based on misinformation" **TOWNSEND v BURKE** 334 U.S. 736 (1948).

The certified Record will show:

(a) Meaningful disclosure was denied by submission of the report at the

eleventh hour. (R:256, SR:20)

(b) Counsel disputed the truthfulness of the allegations at sentencing, styling the report "a pack of lies". (SR:21)

(c) The Trial Court reprimanded Counsel (SR:21), precluding him from a further challenge for the record. Counsel later submitted an AFFIDAVIT (SR:21), and MOTION TO SUPPLEMENT/CORRECT THE RECORD (SR:16), recording the facts and circumstances. The MOTION was granted (SR:19).

(d) Defendant duly filed her MOTION TO VACATE SENTENCE (R:224) with MEMORANDUM (R:242), attacking specific "false and prejudicial statements" (R:245), effectively "shifting to the prosecutor the burden of production on those allegations"[6] The MOTION was

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[6] **GEORGETOWN LAW JOURNAL** Vol. 66, 1515, 1529.

summarily denied (R:225), and Defendant has been continually denied meaningful access, to allow to correction of the Report.

(e) The Alabama Court of Criminal Appeals denied relief, claiming "there is nothing in the record which supports the claim of the appellant", in spite of the foregoing, and the Record proof described.

The Alabama Court of Criminal Appeals erred in holding there was no objection on the Record, and in failing to remand for a due process hearing and correction of the Pre-Sentence Report, with its "naked allegations".

See **GEORGETOWN LAW JOURNAL**, Vol. 66, 1515, 1529, 1530:

> "... if an assertion in the pre-sentence report consists of a **naked allegation without supporting facts**, a mere denial should be enough to shift to the prosecutor the burden of production regarding the allegation. Requiring the defendant to do more would force him to contest an allegation without knowing the information on which it rests. Unknown

> hearsay statements are not afforded prima facie value in any other area of the criminal justice system; a defendant in the sentencing context should therefore only be required to deny a **naked allegation** to fulfill his burden of production." (emphasis added)

The ORDER (R:255) denying Defendant's MOTION TO VACATE SENTENCE (R:224) without a hearing, is evidence of jurisdiction on the subject matter. The ORDER thus tacitly concedes that objections to the falsehoods in the Report were duly raised for the Record.

The Alabama Court of Appeals well knew, also, that Jayne Moore had legally challenged NINE SPECIFIC EXAMPLES of "falsehood, bias and misrepresentations", in the official Record at (R:245). They were:

"1. A sum of $21,000, which does not belong tc the Defendant, and which has no connection to her.

"2. A "street value" was affixed to the "drugs" seized, which bears no true relation to reality. The pretended value calculates 401.8 grams of simple sugar to sell for approximately $110.00 per gram or 3100.00 per ounce.

"3. Books found on the premises and names of

banks are not and cannot be material or "relevant" to any charge of "possessing drugs".

"4. A greenhouse and potting trays with the notation (marijuana?).[7]

"5. Claimed guilt by association with one "Luke Carswell"[8], who had allegedly "been selling drugs for some time", but who had not been accused or charged with any such offense.

"6. A false claim that Defendant had a connection with "marijuana on 3,000 acres of land".

"7. A false claim of a "recently harvested field of marijuana" connected with the Defendant, along with a "chainsaw used to harvest it".

"8. A false claim that Defendant was involved in "cleaning and producing mass quantities of marijuana".

"9. A false claim that the Defendant "commanded the dogs to attack the police", et cetera."

See **UNITED STATES v WESTON**, 448 F.2d 626, 634, where the Court held:

> "In **Townsend v Burke**, supra, the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A

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[7] When there was absolutely no sign or evidence of any marijuana in any potting trays, and no "greenhouse" on the premises.

[8] Deceased, not able to defend his name or reputation.

> rational penal system must have some concern for the **probable accuracy of the informational inputs** in the sentencing process". (emphasis added)

Petitioner respectfully asks: How much "probable accuracy of the informational inputs in the sentencing process" can be expected when the Alabama Courts fail and refuse to allow correction of the Pre-Sentence Report?

Petitioner prays that this Court will take jurisdiction on Certiorari; and duly remand to the Alabama Courts, with instructions for a plenary hearing on Defendant's original MOTION TO VACATE SENTENCE (R:224), thus protecting the Defendant's fundamental due process rights.

QUESTION II.
FAILURE TO PROPERLY CHARGE THE JURY

The Court erred in refusing to give Defendant's requested instructions on the defense of "duress of coverture", based on the innocent wife to guilty husband relationship, thus depriving Defendant of an impartial jury trial, due process, and equal protection, guaranteed by the Sixth and Fourteenth Amendments.

(1)

The Trial Judge agreed to include, in his general charge, that "mere presence" where drugs were found does not constitute criminal conduct, but he failed to do so.

Defendant's charge No.2 (R:220) in pertinent part was:

> "... if the jury find from the evidence that the conduct of the accused amounted to no more than being present where cocaine, marijuana and diazepam were possessed by her husband then the jury may presume that the cocaine, marijuana and diazepam were possessed solely by the husband and the jury may acquit the accused even if the jury find ... that the accused knew of the presence of cocaine, marijuana and diazepam at the given time and place in question or issue."

The Trial Judge endorsed the Charge in writing "Const" (R:238) and agreed to cover the substance in the general charge before the jury, but failed to do so.

The **MOORE** OPINION, at 986, states:

> "... appellant's contention that the trial court improperly refused the preserved written requested charge is without merit:
>
> "The refusal of a charge, though a correct statement of law, shall not be cause for a reversal if it appears that the same rule of law was substantially and fairly given ..." Ala. Code 12-16-13 (1975).

> "We have reviewed the refused charge and find that it was fully covered in the court's oral charge ..."

The OPINION stands in plain error, unsupported by the Record. Nowhere did the Trial Judge charge the essence of Defendant's request.

Because Defendant's evidence tended to show that the drugs were most probably possessed by her husband, she was lawfully entitled to have the jury charged in accord with her Instruction NO.2.

(2)

The Trial Judge, well knowing Defendant's husband had been previously convicted for narcotics possession on the same evidence shown by the State, refused in writing to instruct on Defendant's requested Charges 3 and 4, respecting "duress of coverture", and the relation of husband and wife, a rule of law indispensible to the defense.

Defendant's Charge NO.3 (R:221), in pertinent part reads:

> "... if the jury find ... that the accused is the wife of Timothy Moore ... convicted of possessing the things ... in this Indictment ... then the jury may

> acquit the accused ... if the accused was present ... solely because of the relationship of husband and wife and for no other purpose."

The Record (R:221) shows the Trial Judge wrote "REFUSED 3" on the face of the written Charge, and did not instruct on its content.

Defendant's Charge NO.4 (R:221, in pertinent part reads:

> "... if the jury find ...that the accused was the wife of Timothy Moore at the time and place in question then the jury must presume that the things pproscribed in this indictment must be presumed to have been possessed by the husband and not the wife and the jury may acquit the accused."

The Record (R:221) shows the Trial Judge wrote "REFUSED" - "Offense of possession of illegal drugs is susceptible of joint commission" on the face of the written Charge, and did not instruct on its content.

(3)

The Alabama Court of Criminal Appeals held that Defendant's requested and refused charges were not "preserved for our review pursuant to **ALLEN v STATE** 414 So.2d 989 (Ala.Cr.App. 1981), affirmed, 414 So.2d 993 (Ala. 1982)."

Petitioner contends that **ALLEN** opinion, as applied by the Alabama Courts to deprive her of the right to the requested jury instructions, is unconstitutional.

THE "AUTOMATIC EXCEPTION" RULE:

The citation of **ALLEN** authority by the Appeals Court directly raises the question of Alabama law, involving the so-called "automatic exception" rule on requested jury charges.

The "automatic exception", as the law of the State prior to **ALLEN** was laid out in Alabama statutes, Act No. 74, Acts of Alabama, 1894-5 page 126, in pertinent part:

> "... on all trials of civil or criminal actions at law it shall not be necessary for the party asking a charge in writing to except to its refusal... but such exception by the party asking the charge in writing shall be presumed, if the charge is refused; ... **provided** the actions and rulings of the trial court are assigned as error in the supreme court." (underline added)

The **ALLEN** opinion, referring to 1975

CODE OF ALABAMA 12-16-13, states at 414 So.2d at 994:

> "This Court, when it adopted the Alabama Rules of Civil Procedure in 1973, superseded the automatic exception statute in **civil cases.** The "automatic exception" statute, nevertheless, still applied in criminal cases, but when the legislature, in its wisdom, adopted Code 1975, 12-16-13 it dropped the automatic exception provision." (underline added)

The Court is claiming that the legislature "dropped" the provision, but did it? First, examine the language of the statute section, CODE 12-16-13:

> "Charges moved for by either party must be in writing and must be given or refused in the terms in which they are written, and it is the duty of the judge to write "given" or "refused" as the case may be, on the document and sign his name thereto, which thereby becomes a part of the record."

It must be self-evident that the legislature intended to preserve the record by showing definitively those requested charges "given" and those "refused". Nowhere in the language of the statute does express any intention of repealing the protection of the written

"refusal", for the record.

The Chief Justice of the Alabama Supreme Court, whose dissenting opinion in ALLEN, at page 996, 997 was shared by three other justices, holds that the "automatic exception" WAS NEITHER REPEALED NOR NULLIFIED:

> "I respectfully dissent. While it is true, as stated by the majority that the reference to the automatic exception was omitted from CODE 1975, 12-16-13, a review of the legislative history surrounding that and other sections fails to demonstrate an intent on the part of the Legislature to abolish the automatic exception rule in criminal cases. (at 996)
>
> "These questions and responses show the concern of the Legislature as to retaining the provision for use in criminal cases. (at 997)
>
> "Cases decided since the enactment of Code 1975 have also recognized that the automatic exception is still in effect for criminal cases. (at 997)

This Court may notice the due process failure, of any "rule" demanding cumulative objections, especially when the rule is "promulgated" solely by the Alabama Courts without legislative authority, entirely outside the language

or intent of the statute itself.

When the Court "rule" forces Defense Counsel TO PROPOSE INSTRUCTIONS IN WRITING, then undergo written "REFUSAL" by the Judge, and even after the Defendant's instructions are refused in writing for the Record, to make still another "EXCEPTION" for "the Record"; the "rule" must be unconstitutional.

There is no "compelling State interest" big enough to burden criminal defendants in this manner. The majority opinion in **ALLEN** must be repugant to the due process clause and the equal protection clause of the Fourteenth Amendment, and is due to be set aside by this Court.

In the face of the plain record that defense counsel submitted requested instructions in writing, according to the law of CODE 12-16-13; and in the face of the plain Record, showing that he Trial Judge wrote "refused" IN WRITING"; the

OPINION of the Alabama Court in **MOORE** is and must be unconstitutional and plainly erroneous, when it effectively denies Defendant relief for a pretended failure to "preserve the record".

(4)

"COVERTURE" INSTRUCTIONS CRITICAL

The Court may notice the critical nature of the "duress of coverture" defense here, where the husband had been previously and independently convicted of "possession" of the identical illegal drugs.

The defense showed that Timothy and Jayne were husband and wife (R159), that she was a Christian woman, actively pursuing a religious life (R171), that she was in "subjection to her husband" (R:175), and that in their marriage, Timothy made the decisions (R:171) and Jayne's attitude was one of acquiescence (R:175).

No facts were shown to controvert

this testimony, which was elicited to support the "duress of coverture" legal defense asserted by Counsel for the Defendant.

The unsubstantiated "legal" premise expressed by the Trial Court that the "offense of possession of illegal drugs is susceptible of joint commission" (R:221) is hardly sufficient to deprive the Defendant of the "coverture" instructions, based on the husband-wife relationship.

If facts were present to prove "joint" commission of the offense, then what harm could come from the "coverture" instructions?

Conversely, when her sole defense was obliterated by the Court's refusal to properly instruct the jury, how can it be pretended that her constitutional rights were protected?

LEGAL AUTHORITY ON COVERTURE:

There was ample authority before the

Trial Court that the "coverture" defense was viable under Alabama law. Defense Counsel presented xerox copies of **STROUSE v LEIPF** 14 So. 667 (1894) and **BRAXTON v STATE** 82 So. 657 to the Court, directly in connection with the requested jury charges.

Additionally Defendant's MOTION FOR A NEW TRIAL cited appropriate federal and constitutional authority on the husband and wife relationship, explaining the wife's innocent presence.

The Appeals Court, likewise, had copious authority, such as:

STROUSE v LEIPF, 14 So 667 (1893):

> "The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands." (At 439)

The common theme throughout the **STROUSE** Opinion is that the husband decides where the domicile of the wife

shall be, and the law even excuses her from crimes, if any, committed by her in the presence of her husband. See **STROUSE** at 442:

> "The doctrine of the common law is, that by marriage the husband and wife become one person in law; that she is under his protection, influence, power and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term coverture. One effect of it is, . . . to excuse her from punishment for crimes committed by her in the presence of her husband, on the ground that she acted under his compulsion. He alone is held responsible for such crimes."

Continuing, later, in **STROUSE**, at p. 443, Chief Justice Stone quotes from **Cooley on Torts**, Section 115, to wit:

> "There is a presumption", says Judge Cooley, 'corresponding to that which is made in the criminal law, that if a wrong is committed by the wife in the presence of the husband, it must have been committed by his consent and under his influence, and consequently, is his wrong rather than that of the wife, and should be redressed in a suit against him alone. But any such presumption is liable to be overthrown by evidence.'"

The North Carolina Supreme Court agrees in principle, stating in **STATE** v **BAXTER**, 208 SE2d 696 (1974), at p. 698:

". . . a man residing with his wife in an apartment, no one else residing or being present therein, may be deemed in constructive possession of marijuana located therein, not withstanding the fact that he is temporarily absent from the apartment and his wife is present therein."

The Georgia Court of Appeals in **LANDERS v STATE**, 152 SE2d 431 (1966), also states, at p. 431:

"When husband and wife reside together, he is the head of the house, whether it be owned by or be rented to the one or the other."

In **ARELLANES v U.S.** 302 Fed 603 (1962), at p. 606, we find:

"On the other hand, mere proximity to the drug, mere presence on the property where it is located or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession."

Continuing with **ARELLANES**, supra, the Court said, at p. 606:

". . . the government states that 'where the narcotics were, there also was Geneva Arellanes'. We cannot view this as a conclusively incriminating circumstance because the presence of the narcotics is also exactly coincidental with the presence of her husband, and Mrs. Arellanes presence with both is as fully explained by her attachment to her husband as it might be by a control over the drugs"."

In **U.S. v DiNOVO**, 523 F2d 197 (1975), the reiterates quotations from **ARELLANES**, supra, and states at p. 201:

> "Janet DiNovo was not discovered in the immediate area of unconcealed narcotics. Thus her contructive possession must be justified on the basis of her possessory interest in the trailor. There was no evidence to show that she owned the trailor."

Contrasting mere presence with "possession" of illegal drugs, in the case of **U.S. v VALENZUELA**, 596 F2d 824, at p. 831, the Court of Appeals stated:

> "In the present case, . . . Berdardina's mere joint occupancy of the house is at best equivocal, and is not alone sufficient to support her conviction of possession. Also see Arellanes "because the presence of the narcotics is also exactly coincidental with the presence of her husband".

Unquestionably the Defendant Jayne Moore was entitled to carry an affirmative defense based on the husband-wife relationship, and was entitled to have the duress of coverture explained to the jury. It was plain error to deprive her of that right.

QUESTION

III.

JUDGMENT OF ACQUITTAL

NO PRIMA FACIE CASE

Was the Motion to Acquit for failure to make a prima facie case on illegal posession of drugs, based on circumstantial evidence, due to be granted?

The Record shows that the Defendant moved for acquittal at the end of the State's case (R:153), and that the Court dictated an ORDER (R:153) denying the Defendant's Motion. The ORDER is set out in full as APPENDIX "A" with this Petition.

The Trial Court failed to follow the simple four part standard governing "Rule 29" Motions for Judgment of Acquittal in federal courts. The standard fully protects the legitimate interests of the

defendant with no prejudice to the prosecution.

Fulfillment of any one test should merit acquittal. Petitioner maintains that she was entitled to acquittal by any test.

See **VIRGINIA LAW REVIEW** Vol. 58, Number 5, May 1972 "CONSTRUCTIVE POSSESSION IN NARCOTICS CASES", at 776:

> **"Four different tests exist for guiding a judge's decision** whether or not to grant a directed verdict of acquittal. Fed. R. Crim. R. 29 suggests:
>
> 'Is the prosecutor's evidence sufficient to convict?
>
> A second calls upon the judge to grant the motion unless the evidence was sufficient to exclude 'every other reasonable hypothesis' than guilt. (cite)
>
> Another ... substantial evidence of the charge avoids a directed verdict (cite)
>
> Finally, 'If the evidence is such that reasonable jurymen must necessarily have a reasonable doubt, the judge must require acquittal ...' (cite)"

The article concludes, in footnote at 767:

> "Under any of these standards for directing a verdict of acquittal, failure of the State to prove one of the required factors should justify removing the case

from the jury."

(1)

SUFFICIENT EVIDENCE TEST

The Record shows that proximity and non-exclusive residency in the trailer was shown; nothing else. The law is clear any culpability of the husband, does not evidence criminal conduct by the wife.

See **LANDER v STATE** 114 Ga. 687, 152 S.E.2d 431, 432 (1966)[9] where the Georgia Supreme Court holds:

> "If a husband and a wife live together, the husband is the head of the house and therefore any contraband found on the premises are presumed to be his, even if there are no other corroborating circumstances. This was true even though the title to the real estate was in the wife's name."

As a matter of law, non-exclusive possession is insufficient to convict for the offenses here charged. See **STATE v McGEE** 473 S.W.2d 686 (Mo. 1971)[10]:

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[9] As reported in **LAND AND WATER REVIEW** Vol. IX, at 247.

[10] **LAND AND WATER REVIEW**, supra, 247.

> "The defendant's proximity to the contraband and his non-exclusive possession of the area where it was found is not sufficient to sustain ... conviction."

The State of Alabama has adopted the "non-exclusive possession" rule. See **PARKS v STATE** 46 Ala.App. 722, 248 So.2d 762 (Ala.Cr.App. 1971). The defendant, Parks, was apprehended in an automobile, driven by another person, which left him in "non-exclusive" occupancy or "Control" of the car. The illegal drugs were found in "plain view"[11] in the car, yet the Court held Parks to be innocent of any wrongdoing:

> "There was no ... incriminating statement, nor evidence of attempted flight... In our opinion, mere presence of a defendant in an automobile is not sufficient to establish the requisite knowledge of the presence of drugs or to prove defendant guilty of aiding or abetting in the illegal possession."

Similarly, in Jayne Moore's case, there was no "incriminating statement" nor any "evidence of flight".

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[11] According to the Court.

See **EVANS v UNITED STATES** (CA9 1958) 257 F2d. 121, cert den 358 U.S., reh den 79 SCt 221, which held:

> "where the defendant is in non-exclusive possession of premises on which illicit drugs are found, it cannot be inferred that he knew of the presence of such drugs **and had control of them**, unless there are other incriminating statements or circumstances tending to buttress such an inference."[12] (emphasis added)

Contrast the decision approving acquittal in **PARKS**, with the Record and OPINION here. Here the Court allowed mere presence in a place alleged to be her residence, with nothing more, to constitute "possession". See **Moore** at 986:

> "we can only consider that evidence which was before the trial judge at the time the motion to exclude was made. (cites)
>
> "Guilty knowledge of the presence of the illegal substance may be established by circumstantial evidence. (cites)
>
> "While mere proximity to contraband is not enough to establish constructive possession, **where other circumstantial evidence ... is sufficiently probative,**

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[12] 56 ALR3d 948, 957.

proximity to contraband coupled with inferred knowledge of its presence will support a finding of guilt on such charges. (cites)" (emphasis added)

"Where as here, the presence of the accused at the scene is established, by both direct and circumstantial evidence, and the **evidence of the accused's knowledge of the presence** of the prohibited substance is shown **together with other incriminating evidence**, the issue of the defendant's guilt should be submitted to the jury. (cites)"

"A thorough review of the evidence in this case, and the authorities on this point convinces us that this was a question for the jury in this case."

Where from the face of the Record before the Trial Judge at the time of the Motion to Acquit (R:153), is the "other circumstantial evidence" "sufficiently probative" to "support a finding of guilt" on such charges?

The Trial Judge cites no such "other evidence" at all in his ORDER (R:153) and there is none.

Although the Appeals Court may have "reviewed" the "evidence", they failed to cite a single culpable "act" by Defendant, to allow an inference to be

drawn that the drugs were under her truthfully under her "dominion" or "control".

See **GARSED v STATE** 51 Ala.App. 622, 288 So2d 161 (1973):

> "... defendant's mere presence will not support conviction of possession of marijuana **absent some act** showing dominion or control." (emphasis added)

The State of Alabama has simply parlayed mere presence and residency into an inference of "possession", allowing the jury to consider and convict purely on speculation and conjecture.

See **COOK v STATE** 341 So2d 183, at 184:

> "no one testified that the appellant and his family were ever at the residence other than the afternoon of the search. There was no testimony that the appellant had any knowledge of or connection with the contraband found by the police."

WHARTON'S CRIMINAL EVIDENCE "Burden and Degree of Proof" Section 17 "Corpus Delecti" defines the substance of a crime as containing an element of "the unlawfulness of some person's conduct."

There was no evidence of unlawful "conduct" on the part of Jayne Moore.

No such "conduct" was cited or advanced in support of the Appeals Court's quotations of "law", the legal maxims stated to rationalize conviction, because the record shows NO ILLEGAL CONDUCT.

The Alabama Court overlooked two simple, controlling legal maxims, common to narcotics cases. The maxims are:

FIRST: "Proximity" PLUS "non-exclusive possession" DOES NOT EQUAL "guilty knowledge".

SECOND: "Constructive possession" MINUS "guilty knowledge" DOES NOT EQUAL CRIMINAL CONDUCT.

By any maxim, or any rule of law, Jayne Moore was innocent, according to the "evidence" shown. There was no "substantial evidence" to allow her conviction.

FAILURE ON PROOF OF CONSTRUCTIVE

POSSESSION

When "constructive possession", standing alone will not allow conviction, how can the State allow conviction LACKING PROOF OF EVEN CONSTRUCTIVE POSSESSION?

See **VIRGINIA LAW REVIEW** Vol. 58, 751 (1972) at 761:

> "Constructive possesion is a legal fiction used by courts to find possession in situtations where it does not in fact exist, but where they nevertheless want an individual to acquire the status of a possessor."

RADKE v STATE 42 Ala.App. 397, 293 So.2d 312, aff'd 292 Ala. 290, 293 So.2d 314, holds that "constructive possession" can be established only upon a showing of:

(1) actual or potential physical control;

(2) intention to exercise dominion; and,

(3) external manifestation of intent and control.

The Court will notice that no finding was made in any Court below, based on

"SUBSTANTIAL EVIDENCE", that Jayne Moore showed any **intention to exercise dominion** or that there was any **external mainfestation of intent and control.**

Hence the proof of even "constructive possession" failed.

Who can explain this serious error of the Alabama Courts, when a helpless woman is sentenced to ten years in prison, based on nothing but evidence of (1) actual or potential physical control, and completely lacking any evidence of the other two attributes absolutely necessary to establish even "constructive possession"?

(2)

OTHER REASONABLE HYPOTHESIS TEST

Can the evidence shown in the State's case in chief be held sufficient to exclude "every other reasonable hypothesis than guilt", thus allowing the case to go to the jury. The evidence clearly showed that the Defendant was

married to a man previously convicted for illegal possession of the very same drugs, seized at the same time, AND THOSE SAME DRUGS were used in evidence against her, at her own separate trial.

THE OTHER REASONABLE HYPOTHESIS IS GLARING.

That hypothesis is the innocent spouse hypothesis, fortified by the legal premise that "proximity" plus "non - exclusive possession" does not equal guilty knowledge, and laid on a foundation of the evidentiary presumption of innocence, NONE OF WHICH HAVE BEEN REPEALED IN DRUG CASES.

The hypothesis is THAT THE HUSBAND WAS THE ONE WHO HAD "DOMINION", as well as "control" over both the premises where the two allegedly resided, and "control" over the illegal drugs. The existence of such a hypothesis is indisputable, and the Defense Counsel ably laid the foundation for it by his cross -

examination, and objections during the State's case in chief.

The Trial Court committed compounded error which fatally prejudiced the Defendant:

First by denying the Motion to Acquit, based on the alternative "reasonable hypothesis" and

Second by failing, sua sponte, to instruct on the existence of that "other reasonable hypothesis" once he denied the Motion to Acquit, and ruled that the "question of ... constructive possession is one for the jury." (R:154)

IT WAS THEREFORE, PLAIN ERROR TO ALLOW THE JURY TO CONVICT ON NOTHING BUT CIRCUMSTANTIAL EVIDENCE, thus compounding the plain error committed by the Trial Court's denial of the Motion to Acquit (R:153).

There was no evidence, either circumstantial or direct, that Jayne Moore ever actually "exercised" any

independent personal dominion or control over either the drugs or the premises, either "jointly" with her husband, or independently, as to her.

Surely the "other reasonable hypothesis" of the faithful, but innocent wife, entitled the Defendant to acquittal, in the face of a total lack of evidence showing any cuplable "conduct" or "act" to establish "guilty knowledge" for the charge of "possession".

The Courts of Alabama deprived Defendant of her constitutional rights, and that deprivation is due to be corrected by this Court.

(3)
SUBSTANTIAL EVIDENCE TEST

This test for granting the verdict of acquittal, according to the Federal Rules of Criminal Procedure, Rule 29, has been effectively argued in this Petition, and does not need to be re-argued here.

Judicial notice of the lack of

substantial evidence appearing in the OPINION of the Alabama Court of Criminal Appeals, **MOORE**, supra, and in the record, to affirmatively link her with the illegal drugs, is sufficent to merit relief.

There was no substantial evidence beyond her "mere presence" in the light of a contested statement as to "residence", and other statements as to residence which were pure hearsay, duly objected to.

Therefore, it is and must be self-evident that the State's case in chief lacked substantial evidence to support it, and therefore the Motion to Acquit was due to be granted.

(4)
REASONABLE JURYMAN TEST

When a reasonable juryman had no evidence that Defendant was in exclusive or effective possession, "dominion" or "control" of the premises where the drugs

were found, much less the illegal drugs themselves; and had no affirmative link of evidence to establish "guilty knowledge", and if he were made aware of the existing legal presumption of the laws of Alabama,[13] to the effect that it was the husband, not the wife, who was the head of the house;[14] would he not have a "reasonable doubt" that she was guilty?

See **PEOPLE v VILLANUEVA** 220 Cal.App 443, 33 Cal Rptr 811,[15] where it was held that in order to establish unlawful possession of narcotics:

> "it must be shown that the accused had dominion and control over the contraband with knowledge of its presence and narcotic character ..."

Where was the "dominion", based on the evidence, and not on speculation or

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[13] Grounded in the common law, and Christian history, undergirding the constitutions of State and Nation.

[14] And it is he, not she, who dominion over the premises.

[15] Cited in 56 ALR 3d 948, 959.

conjecture? There was none, if the evidence was to serve as the sole foundation for a conviction of the crime.

Would any man of you allow his wife to suffer conviction in the face of such a doubt?

Surely, then, no "reasonable" juryman could fail to have a reasonable doubt.

Conviction on a criminal offense demands proof to a moral certainty that the Defendant is guilty of the crime, including proof of "guilty knowledge". Where was the proof of guilt or guilty knowledge to a MORAL CERTAINTY?

Therefore, a reasonable juror would have to acquit.

SUMMATION OF ACQUITTAL TESTS:

It appears therefore, that even though just one of the acquittal tests above would be sufficient, according to the sense of Federal Rule 29, the case of the Petitioner here is such that the Petitioner WAS ENTITLED TO ACQUITTAL BY

EVERY ONE OF THE FOUR TESTS.

This Court, having examined the reasons therefore, is due to find that the Petitioner was deprived of right and justice by the failure of the Trial Court to acquit, and the error of the Appeals Court in refusing to direct that proper verdict, on the grounds that the State made no prima facie case.

CONCLUSION

WHEREFORE, Petitioner Jayne Moore, submits that the Writ of Certiorari is due to be granted, and upon final determination of the cause, the Petitioner's conviction in the Montgomery County, Alabama Circuit Court should be reversed.

For the reasons shown hereinabove, and in the interests of justice, and the equal protection of laws, as applied to the Petitioner, a woman who has been unlawfully convicted solely upon evidence of illegal acts by her husband,

Petitioner moves the Court to issue its Writ of Certiorari to the Alabama Court of Criminal Appeals, commanding the Clerk to forward the Record for examination and hearing of the case.

Respectfully submitted

Jayne Moore, Attorney for herself

P.O. BOX 5071
Montgomery, Alabama 36103

AFFIDAVIT OF SERVICE

I, Jayne Moore, first being duly sworn, hereby certify that on this the ___ day of January, 1985, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI on the State of Alabama, Respondent herein, by mailing a copy in a duly addressed envelope, First Class Postage paid, addressed to:

Charles Graddick, Attorney General
250 Administrative Building
64 North Uniion Street
Montgomery, Alabama

_____
JAYNE MOORE

Subscribed and affirmed before me this _____ day of January, 1985

_____
NOTARY PUBLIC
My commission expires _____.

APPENDIX A

HANDWRITTEN BY THE COURT: At the conclusion of the State's case, the Defendant moved for a judgment of acquittal; and for a directed verdict, and to exclude the State's evidence, separately and severally, and as grounds therefor, the defendant states separately and severally that the State has failed to prove a prima facie case; that the State has failed to prove that the defendant ever had any contact with the drugs set forth in the indictment; the State failed to prove the defendant had any contact whatsoever with the trailer or with the other buildings wherein the drugs set forth in the indictment were found.

ORDER

There is an abundance of evidence that drugs, drug paraphanelia and literature were found in a house trailer and an outbuilding at a trailer in

Sellers Station, Montogmery County, Alabama. The evidence showed that the defendant acknowledged to the arresting officer or some of them that this was, in fact, her residence; the evidence shows that the defendant's husband lived in the trailer also; the defendant brought out that the defendant's husband had been convicted of possession of the drugs in question. In the opinion of the Court, the question of possession, a constructive possession, is one for the Jury.

Motions are therefore overruled.

Signed: Joseph Phelps, Judge.

(Record, 153-54)